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In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* NISSAN NORTH AMERICA, INC., IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief in support of the petition of DaimlerChrysler is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for petitioners and respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The State of Ohio, like virtually all States, offers both in-state and out-of-state businesses tax benefits and related incentives to foster local economic development and create jobs. In particular, Ohio has enacted an investment tax credit ("ITC") that grants a non-refundable credit against the State's corporate franchise tax to any taxpayer that "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by a particular date. Ohio Rev. Code § 5733.33(B)(1). Since 1995, corporations, including petitioner DaimlerChrysler Corporation, relying on that provision have invested more than $30 billion in Ohio plants and equipment. Pet. 4. The Sixth Circuit below held that this Court's decisions compel the conclusion that the Ohio ITC violates the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3.

Amicus Nissan North America, Inc. ("Nissan") has a direct and substantial interest in this case. Nissan is a global automobile company headquartered in Japan with major operations in North America, including operations within the Sixth Circuit. Nissan's plant in Smyrna, Tennessee, covers

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or part and that no entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

5.2 million square feet and is one of the largest automobile production plants under one roof in the United States. Nissan manufactures more than 500,000 vehicles at the Smyrna plant each year, including its Xterra and Pathfinder SUVs, Frontier pickups, Maxima sports sedans, and Altima mid-size sedans. As explained below, Nissan's Smyrna plant and a second manufacturing facility in Decherd, Tennessee, have resulted in the investment by Nissan of billions of dollars in infrastructure and equipment in Tennessee as well as the creation of more than 10,000 high-wage paying jobs.

Nissan receives tax incentives from the State of Tennessee based, in part, on the extent of business that it does in Tennessee and the workers it employs. These incentives are part of a coordinated effort by the State to encourage the investment by high-wage industries in new plants and equipment in Tennessee. Not only is that effort hugely popular, it has produced enormous economic dividends for the State. Although the Tennessee incentive scheme differs from the Ohio ITC invalidated by the Sixth Circuit, the Sixth Circuit's decision nonetheless creates uncertainty for businesses such as Nissan that are considering investing in new facilities in Tennessee or other States.

As a major multi-national corporation with global sales, Nissan may consider investing not only in States and communities outside of the Sixth Circuit, but in other countries that may offer more favorable and reliable tax and economic incentives. Foreign competition for manufacturing jobs has become increasingly intense. The plaintiffs' (respondents in this Court) effort to "level the playing field" among the fifty States ignores the reality that the playing field is global, not national, and their attempt to level the field can only result in tilting it in favor of other countries. The decision in this case jeopardizes the ability of the United

States to compete for foreign investment by offering tax incentives that are barred according to the Sixth Circuit's reading of this Court's precedents.

If allowed to stand, the Sixth Circuit's decision will unavoidably affect Nissan's decisions regarding the location of and investment in its manufacturing facilities in the future. Accordingly, Nissan has a strong interest in ensuring that this Court reviews the Sixth Circuit's decision invalidating the Ohio ITC.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case meets several independent criteria for certiorari. *See* S. Ct. Rule 10. First, the case undeniabiy presents an issue of extraordinary importance. The Sixth Circuit's decision declares unconstitutional an Ohio law tbat grants tax credits to businesses that invest in local infrastructure in a manner that is in no way dependent on a company's out-of-state activities. Every State in the Union offers economic incentives such as tax credits to promote in-state investment and economic growth. *See* Walter Hellerstein & Dan T. Coenan, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996).

These provisions have resulted in the investment of billions of dollars in Tennessee and other States by both U.S. companies and the North American divisions of foreign companies such as Nissan. The decision below creates economic uncertainty about the availability of these tax incentives and therefore may have the unintended consequence of diverting billions of dollars of investment, not to mention thousands of manufacturing jobs, to other countries.

Second, the Sixth Circuit's decision is contrary to this Court's own Commerce Clause precedents. This Court has held that the "'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)). The "paradigmatic example" of such a measure is a law that "taxes goods imported from other States, but does not tax similar products produced in State." *Id.* at 193. At the same time, the Court has made clear that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," and that States are free to "compete with other States for a share of interstate commerce." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-337 (1977). Indeed, "it is undisputed that States may try to attract business by creating an environment conducive to economic activity," including "low taxes." *West Lynn Creamery*, 512 U.S. at 199 n.15 (citing cases); *see also Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("There seems to be nothing . . . that would prevent [a State] from providing subsidies or other tax breaks to domestic industries."). The Commerce Clause simply erects no prohibition—dormant or otherwise—on State laws like the Ohio ITC that create tax incentives for investment based solely on in-state activities and that are in no way dependent on a company's out-of-state activities.

Third, the Sixth Circuit's decision directly conflicts with a decision of the Michigan Supreme Court. In *Caterpillar v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), the Michigan Supreme Court held that a business tax deduction

designed to encourage capital investment in Michigan did not violate the dormant Commerce Clause. Like the Ohio ITC, the Michigan tax incentive law was designed "so that only those acquisitions that relate to Michigan business activity" are relevant to the incentives. *Id.* at 187. The Michigan Supreme Court squarely rejected the argument that the tax incentive at issue was "discriminatory because it was enacted to promote investment in Michigan" and, invoking this Court's precedents, stressed that "States are free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Id.* at 192 (quoting *Boston Stock Exchange*, 429 U.S. at 336-337). The direct conflict between the Sixth Circuit's decision in this case and the Michigan Supreme Court's decision in *Caterpillar* not only exacerbates the confusion and unpredictability that will be created by this case if the decision below is allowed to stand, but provides an independent basis to grant plenary review in this case.

REASONS FOR GRANTING THE WRIT

I. THE EXTRAORDINARY IMPORTANCE OF THE QUESTION PRESENTED EXTENDS FAR BEYOND THE DECISION OF THE COURT OF APPEALS, WHICH POSES A DIRECT THREAT TO STATES' EFFORTS TO SUCCEED IN THE GLOBAL COMPETITION FOR INVESTMENT AND HIGH WAGE JOBS.

A. As Nissan's Own Experience In Tennessee Illustrates, Tax Incentives like the Ohio ITC Are Critical In Promoting Economic Growth.

The constitutionality of tax incentives such as the Ohio ITC is a matter of exceptional national importance. All States

offer economic incentives—such as tax benefits—to promote in-state investment and economic activity. *See* Walter Hellerstein & Dan T. Coenan, *supra*, at 790. In Ohio alone, it is estimated that corporations relying on such incentives, including petitioner, have invested more than $30 billion in industrial plants and equipment. Pet. 4. This investment has transformed economically depressed areas and created thousands of high-paying jobs. But the uncertainty created by the Sixth Circuit's decision in this case as to the constitutionality of such incentives may lead companies to invest in other States—or, in the case of multi-national companies such as Nissan, other countries—and thus inflict great economic harm on American communities.

The importance of this case is underscored by Nissan's own investment experience in Tennessee. For nearly half a century, the State of Tennessee has sought to encourage the location in Tennessee of plants and equipment by high-wage industries by providing a variety of tax incentives for investments in plants and equipment located in Tennessee. *See McConnell v. City of Lebanon, Tennessee*, 203 Tenn. 498, 514-15 (1958). A centerpiece of these efforts was the State's successful negotiation in 1980 with Nissan that led Nissan to locate its first automobile manufacturing plant in the United States in Smyrna, Tennessee. The Smyrna plant is one of the largest automotive production plants under one roof in the United States. Nissan later constructed a separate plant in Decherd, Tennessee. Since 1980, Nissan has invested approximately $2.8 billion in plants and equipment in Tennessee and created some 12,000 jobs at these plants. *Nissan plans to expand Pathfinder Production Facility in Tennessee*, NEWPORT PLAIN TALK (Newport, Tennessee), June 26, 2003 (investment in Tennessee); *Nissan to Expand Decherd Powertrain Plant*; BUSINESS WIRE Friday, July 16, 2004 (number of jobs).

The effect of these industrial recruitment efforts has literally transformed Tennessee's economy. In each of the last nine years there have been between $2 billion and $4.4 billion invested in plants and equipment by all manufacturers in Tennessee. Tom Sharp, *Federal case on tax breaks could affect Tennessee*, THE TENNESSEAN (Nashville, Tennessee), September 13, 2004. Nissan's Smyrna plant, along with others, has spawned the location of more than 950 parts manufacturing plants and supplier facilities in and around Middle Tennessee, collectively estimated to employ more than "154,000 Tennesseans representing 33% of the state's manufacturing workforce and 5.7% of total state employment." *Nissan Announces 1,500 Jobs Coming to Smyrna*, THE LEWISBURG TRIBUNE (Lewisburg, Tennessee), June 26, 2004. This job multiplier effect makes the automotive industry, in particular, a highly sought-after boon for State economies. Each manufacturing job at a major automotive facility like that operated by Nissan in Smyrna spins off an additional 9.4 jobs. Institute of Labor and Industrial Relations at the University of Michigan, et al., *Contribution of the U.S. Motor Vehicle Industry to the Economies of the United States, California, New York, and New Jersey in 2003* (May 2004) (available at http:/www.cargroup.org/pdfs/ContributionStudy.pdf).

Tennessee, a comparatively low-wage state,[2] has benefitted immensely from the high-paying jobs created by Nissan's multi-billion dollar investment in its Tennessee plants. Assembly line jobs at Nissan's Smyrna and Decherd facilities provide an average annual wage in excess of $57,000—over $25,000 higher than the state average. *Nissan Expansion Good News for Regional Economy*, DAILY NEWS JOURNAL (Murfreesboro, Tennessee), July 21, 2000 (citing Tennessee Commissioner of Economic and Community Development); Bureau of Labor Statistics, *supra*. All told, Tennessee's automotive manufacturers provide jobs, with a Tennessee payroll in excess of $5.7 billion, which represent the first opportunity for thousands of Tennessee families to move solidly into the middle class.

B. The Competition For Automotive Manufacturing Jobs Is Global And Pits Tennessee Against Mexico, Canada, And A Growing Number Of Other Nations With Sophisticated Automotive Industries.

These tax incentives are not only critical to competition for investment among the various States, but also are increasingly important in competing with other countries for investment in the global marketplace. Recent experience involving Nissan illustrates that in a global economy, particularly since the ratification of the NAFTA Treaty, States

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[2] Tennessee ranked thirtieth among the 50 States and District of Columbia for average annual pay in 2001. Bureau of Labor Statistics, *State average annual pay for 2000 and 2001*, www.bls.gov/news.release/annpay.t02.htm. By comparison, States like New York, ranked third, and California, ranked sixth, have an abundance of high-wage jobs. Each State has different employment needs and should be permitted to tailor incentive programs to meet those needs.

within the United States compete for manufacturing jobs not only among themselves, but also with foreign countries.

In 2001, for example, when Nissan decided to expand its engine plant in Decherd, Tennessee, as part of an overall Tennessee investment of more than $1 billion, it added approximately 1,000 additional high-paying Tennessee jobs to Franklin County. Bernard Bush, *Decherd to Get Nissan Metal Forge*, THE TENNESSEAN, July 17, 2004. In 2004, Nissan further expanded the Decherd facility to add a crankshaft production center. *Id.* In deciding where to place this operation, Nissan's business determination ultimately came down to a choice between expanding its facility in Decherd, Tennessee, or expanding its existing factory in Aguascalientes, Mexico, where it is currently manufacturing 250,000 Sentra automobiles annually, many of which are exported duty-free to the United States. The tax incentives offered to Nissan by Tennessee played a significant role in offsetting the very substantial wage differential between Tennessee and Mexico and thus were an important factor in Nissan's decision to invest in its Decherd, Tennessee, plant for this project. In other major Tennessee investments in the past four years, Nissan has established new production lines and expanded facilities for manufacturing its Pathfinder and Maxima vehicles in Smyrna, Tennessee. The recent Maxima and Pathfinder operations, together with the recent Decherd engine plant expansion and crankshaft production line mentioned above, added more than 2,000 new Tennessee Nissan jobs. *all transferred from existing facilities in Japan.* Wayne Thomas and Larry Nee, *Nissan Plans Forging Plant*, THE HERALD CHRONICLE (Winchester, Tennessee), July 20, 2004; John Callow, *Nissan to Add 1,500 More Jobs*, DAILY NEWS JOURNAL (Murfreesboro, Tennessee), June 26, 2003.

C. The Sixth Circuit's Decision Creates Enormous Uncertainty In A Key Industrial Region Over The Validity Of Vital Economic Incentives.

Nissan in no way concedes that the Tennessee tax incentives on which it has relied in deciding to invest billions of dollars in manufacturing plants and equipment in Tennessee are unconstitutional, and it is prepared to contest that matter should it ever become necessary to litigate the issue. However, the mere perception of possible unconstitutionality that the court of appeals' decision has engendered and the uncertainty and hesitancy it has created in the minds of those who must decide whether to invest in Tennessee or elsewhere alone will necessarily impact Tennessee's efforts. Accordingly, by casting doubt on the constitutional validity of tax incentives, the court of appeals' decision in this case could substantially impair Tennessee's ability to attract new industry and create new jobs, not to mention the ability of the other States within the Sixth Circuit to do the same.

But Tennessee's or Ohio's potential loss will not necessarily be Alabama's or Mississippi's gain, rather it may well be Mexico's, Canada's, or some other country's gain, and Tennessee and, ultimately, the entire United States will be the losers. Moreover, to the extent that manufacturers continue to make investments within the United States, the balkanization among the States created by the court of appeals' decision—which is controlling in Michigan, Ohio, Kentucky, and Tennessee—puts those four States at a distinct disadvantage vis-a-vis the 46 other States in competing for major manufacturing investments by global companies in the United States.

While its reach and applicability to other tax incentive statutes remains unclear, the Sixth Circuit's decision raises a host of difficult issues:

- Will the reductions in tax liabilities by the application of tax credits be abolished prospectively, and if so, beginning when?

- Will the new *Cuno* rule be applied retroactively in the form of assessments of tax deficiencies based on retroactive disallowance of the tax credits, and if so, for how many years back?

- How will companies that long ago performed their part of the bargain and made investments in reliance upon the tax incentives be made whole if the incentives are declared unconstitutional?

In deciding whether to expand its existing plants in Tennessee, Nissan will have to significantly discount if not disregard the tax incentives in its analysis. The uncertainty may force Nissan to look elsewhere, perhaps to its other U.S. plant located in Mississippi—a State in a Circuit not directly under the same cloud of uncertainty—or to defer expanding further anywhere in the United States until such time as the uncertainty in the tax incentive structure has been settled.

Moreover, in the wake of the decision in this case, it is unclear whether foreign manufacturers will continue to have the same level of confidence in the stability and predictability of the tax laws of the United States. In addition to Nissan, BMW, Toyota, Honda, Hyundai, and other foreign automobile manufacturers have invested billions of dollars in plants and equipment in various States, both within and outside the Sixth Circuit. Before making billion-dollar

investments in U.S. communities in reliance upon State tax incentives, negotiators of incentive packages for foreign manufacturers will have to ask themselves whether they will later find their trust was misplaced and their reliance was based on an unfulfilled commitment. Officials of Nissan and other foreign manufacturers who have invested in the United States in good faith have reason to be concerned that these States may not be able to make good on their promises of significant long-term future tax incentives upon which they relied to make massive investments in plants and development in those States. By reversing the decision of the court of appeals, this Court can assuage those concerns and provide the answer that their confidence was not misplaced—the commitments will be kept.

This Court should grant certiorari to resolve that uncertainty by making clear that tax incentives such as the Ohio ITC are constitutional. States and local governments may debate the desirability and tradeoffs of conferring such benefits, but this Court should resolve any doubt that the Constitution leaves States and local governments free to enact such tax incentives if they see fit.

II. THE SIXTH CIRCUIT'S DECISION IS FUNDAMENTALLY AT ODDS WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

The need for this Court's review is heightened by the fact that the Sixth Circuit's decision contravenes the basic principles established by this Court's Commerce Clause precedents. The dormant Commerce Clause was designed to prohibit "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery,*

Inc. v. Healy, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)). The Sixth Circuit, however, has broadly interpreted this Court's Commerce Clause decisions to prohibit State efforts to attract interstate commerce by conferring tax incentives that reward in-state economic activity but in no way penalize activity in other States. The logic of the court of appeals' decision, moreover, theoretically extends beyond tax credits to virtually any incentive—direct subsidies, better schools or roads, commitments to invest in surrounding areas—that a State might offer to attract business to its communities.

In reaching that conclusion, the Sixth Circuit relied on a trio of this Court's decisions—*Boston Stock Exchange*, *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Pet. App. 6a-9a. The State law invalidated in each of those cases, however, differs in a critical respect from the Ohio ITC at issue in this case. In *Boston Stock Exchange*, the Court held unconstitutional a State transfer tax statute that operated so that securities "transactions involving an out-of-state sale [were] . . . taxed more heavily than most transactions involving a sale within the State." 429 U.S. at 319. In *Maryland*, the Court invalidated a State "first use" tax that applied primarily to "gas moving *out of* State," and that, through the operation of credits and exclusions, was largely inapplicable to in-state users of gas. 451 U.S. at 759; *see id.* at 756-757. And, in *Westinghouse Electric*, the Court struck down a State franchise tax credit that not only rewarded increased activity in the State, but "penalize[d]" increased activity in *other* States. 466 U.S. at 401. Thus, each of these cases involved "state tax statutes that encouraged the development of local industry by means of taxing measures that imposed greater burdens on economic activities taking place outside the State than were placed on

similar activities within the State." *Id.* at 403-404. In stark contrast, as both the court of appeals and district court recognized, the Ohio ITC is in no way dependent on a company's activities outside the State and in no way penalizes such activity. *See* Pet. App. 6a; *see id.* at 29a. Its sole function is to reward economic activity *within* the State.

This Court has observed that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity," including "low taxes." *West Lynn Creamery*, 512 U.S. at 199 n.15 (citing cases). In addition, individual Justices have observed that States may offer tax incentives that benefit local industry without penalizing out-of-state businesses. *See, e.g., Chemical Waste Mgmt.*, 504 U.S. at 351 (Rehnquist, C.J., dissenting) ("There seems to be nothing . . . that would prevent [a State] from providing subsidies or other tax breaks to domestic industries."); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) (The Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a *tax credit*, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.") (emphasis added). The Sixth Circuit's decision is not only fundamentally at odds with this Court's precedents, but creates a dormant Commerce Clause that will swallow virtually any State law that seeks to encourage in-state investment simply by rewarding it. At a bare minimum, such a far-reaching and counter-intuitive result warrants careful scrutiny by this Court.

III. THE SIXTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH A DECISION OF THE MICHIGAN SUPREME COURT.

The Sixth Circuit's decision also conflicts with a decision of a State court of last resort within that Circuit. In *Caterpillar v. Department of Treasury*, 440 Mich. 400, 488 N.W.2d 182 (Mich. 1992), the Michigan Supreme Court—relying on the same body of this Court's case law considered by the Sixth Circuit—held that a State tax deduction designed to encourage capital investment in Michigan did not violate the dormant Commerce Clause. The law at issue in *Caterpillar*—the "capital acquisition deduction" ("CAD")—provides a business tax deduction for companies making capital investments in Michigan and was designed "*so that only those acquisitions that relate to Michigan business activity are included in the CAD.*" *Id.* at 187 (emphasis added).

Caterpillar, Inc. challenged the Michigan tax deduction because it was apportioned according to a formula based only on the location of the taxpayers' property and payroll, without consideration of the taxpayer's sales. Caterpillar argued that the deduction was "discriminatory because it was enacted to promote investment in Michigan." *Id.* at 192. The Michigan Supreme Court squarely rejected that argument, invoking this Court's admonition that "States are free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Id.* at 192 (quoting *Boston Stock Exchange*, 429 U.S. at 336-337).

The Michigan high court's decision in *Caterpillar* squarely conflicts with the Sixth Circuit's decision below. The tax incentive in *Caterpillar* was directed at the same economic activity—i.e., in-state investment—rewarded by the Ohio ITC.

The constitutional challenge in *Caterpillar* turned on the same legal principle—the anti-discrimination prong of the *Complete Auto* test—that is the crux of the Sixth Circuit's decision below. In addressing that issue, both the Michigan Supreme Court in *Caterpillar* and the Sixth Circuit below relied the same key Commerce Clause decisions of this Court. The Michigan high court, however, interpreted those decisions as supporting the opposite conclusion as the result reached by the Sixth Circuit below—that incentives tied to in-state investment are constitutional. That irreconcilable conflict provides an independent basis for granting certiorari.

CONCLUSION

For the foregoing reasons, and those in the petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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